

REMARKS

This Amendment is submitted in response to the non-final Office Action mailed on March 30, 2006. No fee is due in connection with this Amendment. The Director is authorized to charge any additional fees which may be required, or to credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 115808-239 on the account statement.

Claims 1-17 are pending in this application. In the Office Action, Claims 1-2, 5, 8-9, 13, 15 and 17 are rejected under 35 U.S.C. §102 and Claims 1-17 are rejected under 35 U.S.C. §103. In response Claims 1-2, 6 and 9 have been amended. This amendment does not add new matter. In view of the amendment and/or for the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claims 1-2, 5, 8-9, 13, 15 and 17 are rejected under 35 U.S.C. §102(a) as anticipated by WO 98/05219 to May et al. ("May") with Webster's Unabridged Dictionary ("Webster's"), U.S. Patent No. 1,720,788 to Hammerstein ("Hammerstein"), U.S. Patent No. 3,156,350 to Lockwood ("Lockwood") and U.S. Patent No. 3,207,642 to Lucich ("Lucich") being relied on as evidence of anticipation by May. Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Applicants respectfully submit that the anticipation rejection is improper because the Patent Office is using 5 references to allege that the present claims are anticipated. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros v. Union Oil of California*, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987) (emphasis added). Federal Circuit decisions have repeatedly emphasized the notion that anticipation cannot be found where less than all elements of a claimed invention are set forth in a reference. *See, e.g. Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364 (Fed. Cir. 2002). In this regard, a reference disclosing "substantially the same thing" is not enough to anticipate. *Jamesbury Corp. v. Litton Indust. Prod., Inc.*, 756 F.2d 1556, 1560 (Fed. Cir. 1985). A single reference must clearly disclose each and every limitation of the claimed invention before anticipation may be found.

Applicants have amended independent Claims 1-2, 6 and 9 to recite, in part, a pet food product having a substantially cylindrical inner phase which extends from the lower end to the

upper end of the outer phase. The amendment is fully supported in the specification, for example, at page 7, lines 1-20 and Figure 3-4. In contrast, Applicants respectfully submit that the cited references fail to disclose or suggest every element of the present claims as currently amended.

For example, *May* fails to disclose or suggest pet food product comprising a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer phase as required, in part, by the present claims. Instead, *May* discloses clearly defined upper and base layers such that, after opening the can and dispensing the pet food, what was the base layer becomes the upper layer (see, *May*, page 2, lines 20-25) rather than vertical layering as in the present invention. Consequently, neither layer of *May* extends from the lower ends to the upper ends of each other. Moreover, neither layer of *May* is in the form of a substantially cylindrical inner phase that extends the entire length of the product.

May goes on to reinforce that “[t]he cans produced by the process contain a product which comprises a lower layer made up of solid pieces of food in a thin sauce and having a substantially conical recess and an upper layer of a substantially solid foodstuff. The layers are clear and distinct...” *May*, page 9, lines 17-20. Therefore, *May* at the most teaches a conical recess that opens into the base layer and fails to teach or suggest a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer, tubular phase of the canned pet food product as in the claimed invention. In fact, *May* also fails to even teach or suggest any outer, tubular phase as required, in part, by the present claims. The remaining references (*Webster's*, *Hammerstein*, *Lockwood* and *Lucich*) fail to remedy the deficiencies of *May* and are not even directed to pet foods products.

For at least the reasons discussed above, Applicants respectfully submit that independent Claims 1-2 and 9 and Claims 5, 8, 13, 15 and 17 that depend from these claims are novel, nonobvious and distinguishable from the cited references.

Accordingly, Applicants respectfully request that the rejection of Claims 1-2, 5, 8-9, 13, 15 and 17 under 35 U.S.C. §102 be withdrawn.

Claims 7, 14 and 16 are rejected under 35 U.S.C. §103(a) as being unpatentable over *May* in view of GB 1327351 to Quaker Oats (“*Quaker Oats*”). Applicant respectfully submits that the patentability of Claim 1 as previously discussed renders moot the obviousness rejection of

Claims 7, 14 and 16 that depend from Claim 1. In this regard, the cited art fails to teach or suggest the elements of Claims 7, 14 and 16 in combination with the novel elements of Claim 1.

In the Office Action, Claims 1-17 are rejected under 35 U.S.C. § 103(a) over EP 769252 to Ohba (“*Ohba*”) in view of GB 341,760 to Vickers (“*Vickers*”) and WO 98/05219 to May (“*May*”), or vice versa, in further view of GB 1327351 to Quaker Oats (“*Quaker Oats*”) and US Patent No. 3,738,847 to Bechtel (“*Bechtel*”), further in view of US Patent No. 2,421,199 to Gutmann (“*Gutmann*”), GB 2,194,125 to Froebel (“*Froebel*”), US Patent No. 2,937,095 to Zitin (“*Zitin*”), US Patent No. 3,385,712 to Dodge (“*Dodge*”) and further in view of, GB 1486634 to Henkel (“*Henkel*”), WO 94/26606 to Mandanas (“*Mandanas*”), U.S. Patent No. 2,344,901 to Routh (“*Routh*”), GB 1583351 to McMahon (“*McMahon*”), EP 675046 to Errass (“*Errass*”), Australia 50797/96 to Hillebrand (“*Hillebrand*”), JP 59-31677 to QP Corp. I (“*QP Corp. I*”) and JP 61-100174 to QP Corp. II (“*QP Corp. II*”) further in view of newly cited U.S. Patent No. 5,518,746 to Diaz (“*Diaz*”), JP 62-104566 to Hoashi (“*Hoashi*”), JP 59-159758 to Honma et al. (“*Honma*”) and JP 57-12987 to Sonoya (“*Sonoya*”). Applicants respectfully disagree with and traverse this rejection for at least the reasons set forth below.

Applicant respectfully submits that because the cited references are directed towards completely unrelated inventions with different objectives, one skilled in the art would not be motivated to modify or combine them to arrive at the present claims. In fact, the Federal Circuit has held that it is “impermissible to use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious.” *In re Fritch*, 23 U.S.P.Q.2d 1780, 1784 (Fed. Cir. 1992). “One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention” *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

For example, *May* is entirely directed to a canned pet food product having two layers (a base and an upper layer). See, *May*, page 2, lines 11-19. *Quaker Oats* and *Bechtel* relate to a pet food of hash type that contains a center core of eggs completely surrounded (e.g. encased) by the meat mixture. *Quaker Oats*, col. 1, lines 12-15; and *Bechtel*, col. 2, lines 16-20. As a result, *Quaker Oats* and *Bechtel* teach away from the layered pet food product of *May*.

Ohba relates to vertically and horizontally packed foods containing two or more packed food products. Similarly, *McMahon* discloses vertically packed foods with two liquid food

products. Further, the Patent Office has cited five additional references, namely *Gutmann*, *Froebel*, *Zitin*, *Dodge* and *Vickers*, in support of *May*. None of these references even relates to canned products, and all but one do not even relate to pet food products.

Gutmann discloses a method of preserving eggs, particularly to a method in which the separated white and yolks of eggs are preserved in coagulated or hard-boiled condition. In this regard, the main object of *Gutmann* is to convert the eggs into a condition in which they can be easily and safely shipped and stored for an unlimited period of time. See, *Gutmann*, column 1, lines 1-8.

Froebel discloses dog treats which are primarily semi-moist products that are co-extruded and have a relatively hard outer skin, and thus are unsuitable for canning. See, *Froebel*, Examples 1-3. *Froebel* distinguishes different categories of pet food, most notably dry, wet and semi-moist as disclosed on page 1. With respect to canned pet foods, *Froebel* discloses various disadvantages, and further suggests that canned products are "unsuitable for use as treats." See, *Froebel*, page 1, line 56-57.

Zitin discloses a cheese core surrounded by meat encased in a casing. See, *Zitin*, column 1, lines 15-19. The product is prepared by inserting a molding in a casing not a can with a liquid meat product, cooking the meat product, removing the mold and pouring molten cheese into the center and allowing it to solidify. See, *Zitin*, cols. 1 and 2. One skilled in the art would not be inclined to modify the horizontal arrangement (i.e., upper and base layers) of the *May* canned food product based on the teachings of *Zitin* directed to a vertical arrangement in a casing. In fact, such a combination would frustrate the teaching of *May* that after opening the can and dispensing the pet food, what was the base layer becomes the upper layer. See, *May*, page 2, lines 20-25. Thus, *May* teaches away from the combination with *Zitin*.

Dodge relates to cooked egg rolls and unlike Applicants' canned invention is completely enclosed in a flexible, synthetic plastic. See, *Dodge*, col. 2, lines 29-34. The synthetic plastic outer wrapper can be either initially tube like of a selected cross-section, or in the form of a strip that is formed into a tube like form of a selected cross-section adjacent the extrusion nozzle. See, *Dodge*, col. 4, lines 4-7.

Moreover, like *Zitin*, *Dodge* relates to a food product with a vertical layer arrangement. Indeed, in *Dodge*'s egg roll structure, the outer layer does not extend from the top end to the

bottom end (see, *Dodge*, Figs. 1 and 2). This is due to packaging constraints such that the egg yolk core can be seen in addition to the egg white portion (i.e., albumen) of the egg roll. In this regard, the primary purpose of *Dodge* is to produce a hard-cooked egg roll packaged in film which would represent enough convenience for both residential and commercial use (see, *Dodge*, col. 1, lines 32-42). As with *Zitin*, there is no motivation to combine or modify *May* with *Dodge* to obtain Applicants' invention.

Vickers relates to meat rolls (i.e., butchers meat, such as beef, veal, etc.) rather than canned pet food products, as required by the claimed invention (see, *Vickers*, col. 1, lines 11-16). The meat roll combines course particles and finer size particles in visually separate phases (see, *Vickers*, Figs. 1 and 2) which is said to improve taste (see *Vickers* at col. 1, line 53 to col. 2, line 63). There is no motivation to combine *Vickers* with *May*, where, in *May*, parallel superimposed layers are formed in contrast to an annular-type configuration disclosed in *Vickers*.

The remaining references do not even relate to pet food products. For example, *Henkel* merely relates to a cosmetic; *Mandanas*, like *Henkel*, has nothing to do with food, particularly pet foods, but merely relates to dispensing a viscous paste from containers, such as squeezable tubes; *Routh* merely relates to ice cream and products thereof; *Errass* merely relates to a condiment product that is dispensed from a tube; and the *QP Corp.* references relate to peanut butter and products thereof. *Diaz* relates to baked foods, *Hoashi* relates to a jelly with meat paste, *Honma* relates to making foods using a coagulated egg yolk and coagulated liquid albumen and *Sonoya* relates to a food container. Therefore, Applicants do not believe one skilled in the art would consider that these references which are unrelated to pet food have any relevance with respect to the canned pet food product of *May*.

Applicants respectfully submit that the Patent Office has improperly applied hindsight reasoning by selectively piecing together teachings of each of the references in an attempt to recreate what the claimed invention discloses. As the Federal Circuit explained, "the mere fact that the prior art may be modified in the manner suggested by the examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, at 1783-17. One cannot use "hindsight reconstruction to pick and choose among isolated disclosures in the prior art" to re-create the claimed invention. *In re Fine*, 5 U.S.P.Q. 2d 1596 (Fed. Cir. 1988).

Applicants also respectfully submit that even if combinable the cited references fail to disclose or suggest every element of the present claims. For example, *May* fails to disclose or suggest a pet food product comprising a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer phase as required, in part, by the present claims as previously detailed. *Ohba* relates to vertically and horizontally packed foods containing two or more packed food products and fails to disclose any pet food product having a substantially cylindrical inner phase or an inner phase that extends from the lower end to the upper end of the outer phase. *Vickers* fails to disclose or suggest any pet food product.

The canned pet food of Applicants' invention has the advantage, for example, of being suitable for use in larger cans where the height of the can is at least as large as the diameter of the can. See, specification, page 2, lines 1-19. In taller cans filled with a product like *May*'s, the upper and base layers would be more difficult to shake out into the pet's bowl or dish. Based on at least these reasons, all of the cited references are deficient with respect to the claimed invention.

The Patent Office relies on numerous other references that teach different cross-sectional shapes of products, many of which are unrelated to canned pet food, to support that it allegedly would have been obvious to use such cross-sectional shapes as a matter of choice or design. Accordingly, the Patent Office relies on references that disclose a particular cross-sectional shape rather than the invention as a whole which includes, in part, pet food in an outer, tubular phase which extends from the lower end to the upper end of a canned pet food product and pet food in a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer phase of the canned pet food product.

The Patent Office relies on *Quaker Oats* and *Bechtel* in support of the deficiencies of *May* with respect to the outer and inner phases of the claimed invention. See, Office Action dated June 3, 2003. The primary focus of these references relates to a pet food of hash type that contains a center core of eggs. *Quaker Oats*, col. 1, lines 12-15; and *Bechtel*, col. 1, lines 34-36. But, nowhere do these references provide that the egg core extends from the top to the bottom of the can as do the inner and outer phases of the present invention. See, Figs. 1-8 of *Quaker Oats* and *Bechtel*. Instead, the egg core is completely encased within (e.g. completely surrounds) the

meat mixture. See, *Bechtel*, column 2, lines 16-20. Consequently, these references do not remedy the deficiencies of *May*.

Most of the remaining references relate to non-pet food products. As a result, they fail to disclose or suggest a pet food product or method of making same as required, in part, by the present claims. Moreover, the remaining references fail to disclose or suggest a pet food product having an outer tubular phase which extends from the lower end to the upper end or a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer phase as required, in part, by the present claims

For example, *McMahon* discloses vertically packed foods with two liquid food products. *Gutmann* discloses a method of preserving eggs, particularly to a method in which the separated white and yolks of eggs are preserved in coagulated or hard-boiled condition. In this regard, the main object of *Gutmann* is to convert the eggs into a condition in which they can be easily and safely shipped and stored for an unlimited period of time. See, *Gutmann*, column 1, lines 1-8.

Froebel discloses dog treats which are primarily semi-moist products that are co-extruded and have a relatively hard outer skin, and thus are unsuitable for canning. See, *Froebel*, Examples 1-3. *Froebel* distinguishes different categories of pet food, most notably dry, wet and semi-moist as disclosed on page 1. With respect to canned pet foods, *Froebel* discloses various disadvantages, and further suggests that canned products are “unsuitable for use as treats.” See, *Froebel*, page 1, line 56-57.

Zitin discloses a cheese core surrounded by meat encased in a casing. See, *Zitin*, column 1, lines 15-19. The product is prepared by inserting a molding in a casing not a can with a liquid meat product, cooking the meat product, removing the mold and pouring molten cheese into the center and allowing it to solidify. See, *Zitin*, cols. 1 and 2. With respect to Claim 1, *Zitin* fails to disclose a canned product, or a tubular phase, or an inner phase extending from the lower end to the upper end. With respect to Claim 2, *Zitin* also fails to disclose filling the outer phase into a can, sealing a can and retorting the sealed can. With respect to Claim 6 *Zitin* also fails to disclose an outer phase that includes a substantially solid, thermally gelled mixture of carbohydrate and protein. Lastly, method Claim 9 of Applicants’ invention is completely unrelated to *Zitin*.

Dodge relates to cooked egg rolls and unlike Applicants' canned invention is wrapped being completely enclosed in a flexible, synthetic plastic. See, *Dodge*, col. 2, lines 29-34. The synthetic plastic outer wrapper can be either initially tube like of a selected cross-section, or in the form of a strip that is formed into a tube like form of a selected cross-section adjacent the extrusion nozzle. See, *Dodge*, col. 4, lines 4-7.

Moreover, like *Zitin*, *Dodge* relates to a food product with a vertical layer arrangement. Indeed, in *Dodge*'s egg roll structure, the outer layer does not extend from the top end to the bottom end (see, *Dodge*, Figs. 1 and 2) and thus fails to disclose or suggest the present claims. This is due to packaging constraints such that the egg yolk core can be seen in addition to the egg white portion (i.e., albumen) of the egg roll.

The Patent Office appears to rely on certain additional references in support of the position that the outer, tubular features of the claimed invention are an allegedly obvious matter of choice and/or design. Even if combinable, clearly these references are deficient with respect to the claimed invention as well. For example, *Henkel* merely relates to a cosmetic; *Mandanas*, like *Henkel*, has nothing to do with food, particularly pet foods, but merely relates to dispensing a viscous paste from containers, such as squeezable tubes; *Routh* merely relates to ice cream and products thereof; *Errass* merely relates to a condiment product that is dispensed from a tube; and the *QP Corp. I and II* references relate to peanut butter and products thereof; *Diaz* relates to baked foods; *Hoashi* relates to a jelly with meat paste; *Honma* relates to making foods using a coagulated egg yolk and coagulated liquid albumen and *Sonya* relates to a food container. Consequently, theses cited references fail to disclose or suggest a pet food product or method of making same as required, in part, by the present claims. Moreover, these references fail to disclose or suggest a pet food product having an outer tubular phase which extends from the lower end to the upper end or a substantially cylindrical inner phase which extends from the lower end to the upper end of the outer phase as required, in part, by the present claims.

Accordingly, Applicants respectfully request that the rejections of Claims 1-17 under 35 U.S.C. §103(a) be withdrawn.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same.

Respectfully submitted,

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Dated: June 28, 2006